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# Reapportionment : an Oregon history and a critique of Baker vs Carr

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Title: Reapportionment: An Oregon History and a Critique of Baker vs Carr.

APPROVED BY MEMBERS OF THE THESIS COMMITTEE:

Thomas D. Morris, Chairman

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This study explores the ways in which federal and state authorities have sought to deal with a difficult problem of political power in the context of the U. S. Constitution. Oregon reapportionment history offers an appropriate introduction to a critique of the national reapportionment decisions of Baker vs Carr and Reynolds vs Sims. Its Constitution stipulated population and the

ratio derived from a population based formula were the means by which apportionment was to be determined and non-compliance had been particularly evident from 1933 to 1952. Also, by the initiative process and a decision by the Oregon Supreme Court, Oregon had resolved its reapportionment problem before national action was taken, demonstrating that a state could resolve such problems without national intervention.

The critique of Baker vs Carr is an attempt to examine the soundness of its judicial logic and thereby to demonstrate the impact it has had in perpetrating certain concepts of government.

The data consulted included interviews with people directly involved in the events considered, Supreme Court decisions, secondary studies, state documents containing legislative minutes and exhibits.

Oregon reapportionment history shows the ability of a state to solve a controversial political problem through the initiative process. However, the judicial logic in Baker vs Carr has created a new majoritarian philosophy of government that is unmindful of traditional concepts of federalism, and the Oregon experience.

# REAPPORTIONMENT: AN OREGON HISTORY AND A CRITIQUE OF BAKER VS CARR

by

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# CHAPTER I

## OREGON REAPPORTIONMENT HISTORY

Philosophically and historically, Oregon reapportionment provides a prelude well-suited to the study of the national reapportionment cases, Baker vs Carr and Reynolds vs Sims. From its inception the Oregon Constitution contained provisions for reapportionment which, to a great extent, embodied the majoritarian philosophy of these decisions. In Section 6 of the Constitution, it stated:

> The number of Senators and Representatives shall at the session next following an enumeration of the inhabitants by the United States, or this State, be fixed by law, and apportioned among the several counties according to the number of white population in each. And the ratio of Senators and Representatives shall be determined by dividing the whole number of white population of such county, or district by such respective ratios; and when a fraction shall result from such division, which shall exceed one half of said ratio, such county, or district shall be entitled to a member for such fraction; And in case any county shall not have the requisite population to entitle such county to a member, then such county shall be attached to some adjoining county for Senatorial or Representative purposes.[1]

[1]Charles H. Carey, ed., The Oregon Constitution, (Salem: State Printing Department, 1926), pp. 407-408.

Population and the ratio resulting from this base were to be the standards for apportioning state senators and state representatives, yet during the first half of the twentieth century Oregon had noticeably faltered in fulfilling its constitutional mandate. The consequence being that Oregon, like many other states, witnessed a dramatic struggle for legislative power between urban and rural areas as gross population inequities abounded. The seriousness of this confrontation was a source of nationwide concern. The magnitude of the controversy became increasingly felt during the late 1940's--a time when the nation, no longer in the shackles of war, directed its attention to the urban metropolis teeming with people and to the growing burdens these numbers created for municipal government and its finances. So great were the problems for cities that the solution to them required political attention outside the realm of municipalities. For the cities' the reapportionment movement, with its urban-oriented slogan 'one-man, one-vote,' began as a search for much-needed solutions and soon became a vehement and meaningful expression of a quest for political identity. But Oregon, unlike most states, distinguished itself. It aligned its reapportionment history with the original intent of the state constitution. The Oregon voters decided this conflict

through the instrumentality of the initiative petition,[2] a notable accomplishment which predated Baker vs Carr.

Oregon's initial apportionment was February 14, 1859. The state's senators and representatives totalled 16 and 34, respectively. A year later the maximum was set at 30 and 60, but it wasn't until 1872 that these numbers were reached. There were twenty-three reapportionments in Oregon between 1859 and 1961: eleven were general reapportionments effecting one or both legislative houses and twelve were minor ones made to allow legislative adjustments for newly created counties. Reapportionments for both legislative branches numbered nine. So perhaps the truest figure for judging the legislature's fulfillment of its constitutional mandate is this latter figure. Initially it appears to be a relatively healthy compliance with the population principle of reapportionment for every ten years in accordance with census figures; however, if just the nine reapportionments stretched over a period of approximately 102 years are considered, the statistics are indeed deceptive. The variable closest to shedding light on the truth is the precise time the nine reapportionments were made. Before 1900 five of them were achieved, two of which were only two years apart, 1862 and 1864. After the turn

[2]Gordon E. Baker, "Reapportionment by Initiative in Oregon," Western Political Quarterly 2 (June 1960): 508.

of the century, four reapportionments were completed. But between the 1931-1933readjustments and the initiative sanctioned demand for reapportionment in November, 1952, there was a span of almost twenty years. Before focusing upon some of the struggle caused by the effects of legislative inaction, a cursory glance at various aspects of Oregon's geography, economy, and demographic patterns is essential.

Many of Oregon's western counties had been formed by natural boundaries. The most easterly counties of western Oregon are bounded on the east by the prominent barrier, the Cascade Mountains, whereas counties on the extreme west are bounded by the Pacific Ocean. There are several remaining counties between these boundary counties of western Oregon. Together all these western counties cover an area of approximately one-third of the state's 96,209[3] square miles. The counties are Clatsop, Columbia, Tillamook, Washington, Multnomah, Clackamas, Yamhill, Marion, Lincoln, Polk, Benton, Linn, Douglas, Coos, Curry, Josephine, and Jackson. The remaining two-thirds of Oregon roll from the Cascade Mountains easterly to the Idaho Border. This spacious eastern expanse has substantially less rainfall,

[3]County and City Data Book, U. S. Department of Commerce Bureau of the Census, 1967.

considerably higher percentage of land under irrigation, and proportionately much larger sized counties than its western counterpart. No large or navigable river, such as the Willamette in western Oregon, cut into this vast area. Only its northern or eastern-most counties could boast of the Columbia or Snake River as their boundary. Along the Columbia River are Hood River, Wasco, Sherman, Gilliam, and Morrow counties. Those counties along the Snake River are Wallowa, Baker, and Malheur counties. Aside from these two groups of eastern counties, there remain Jefferson, Deschutes, Klamath, Lake, Crook, Wheeler, Grant, Harney, Union, and Umatilla counties.

Economically, the western counties are more diversified agriculturally and industrially than the eastern counties. The multiplicity of transportation routes and of transportation modes in western Oregon are contributive to important concentrations of industrialization. But the vastness and dryness of eastern Oregon is and was conducive to large farms, a fact long known in Oregon and one confirmed by 1964 figures. They indicate approximately 1/2 of eastern Oregon contained farms of 3,000 to 6,000[4] acres, and a substantial portion of the remaining half area were in

[4] A Preliminary Atlas of Oregon, University of Oregon, Department of Geography, pp. 5-1, 5-2 (based on 1964 figures.)

farms between 1,000 to 3,000[5] acres. On the other hand western Oregon's farm size averaged between 100 to 500[6] acres. Of this land in eastern Oregon most was used for hay, wheat, Irish potatoes, or cattle production along with significant contributions of fruit production from Hood River and Wasco counties. Looking at a map showing irrigation statistics by counties one can see between 60 to 100%[7] of land under irrigation in eastern Oregon as contrasted by 0 to 80%[8] under irrigation in western Oregon of which 20 to 40%[9] was the greatest amount.

The history of Oregon's demographic patterns is interwoven with its geographic features and economic development. Population growth is important, since not only does it account for the creation of counties and the establishment of senatorial and representative districts, but it also introduces the problem of representation and population consistency.

Before 1860 people flocked to the western region of the state, settling primarily along coastal areas and

[5] A Preliminary Atlas of Oregon, University of Oregon, Department of Geography, pp. 5-1, 5-2 (based on 1964 figures).

[6] Ibid.

[7] Ibid. pp. 5-5, 5-6 (based on 1964 figures).

[8] Ibid.

[9] Ibid.

rivers such as the Willamette and Tualatin. As the nineteenth century came to a close, western Oregon continued in its population increase. As Indian troubles subsided and knowledge of eastern Oregon's timber resources, gold discoveries, grazing lands, and soil rich for grain crops became known, there was a tremendous spur of population growth in this region, too. But by 1930 the figures reflected steep population drops in this region, whereas western Oregon continued to show population expansion. In 1930 Multnomah County alone with its major city, Portland, had approximately 35% of the state's total. From this time to the 1960's, the state's pattern of growth by numbers was in western Oregon predominately. There were many reasons for such a development. Among them were the attractions of commerce and industry afforded by the metropolitan areas along the Willamette River. Coastal regions increasingly drew retirees to what soon became a retirement oasis and it also catered to vacationers by developing its recreation centers. Needless to say, the automobile made its indelible imprint on Oregon's population character. Western Oregon's advantage of more and better roads plus the opportunities awaiting people seeking work in centers of industry and lumber camps brought an influx of immigrants and migrants. Some of the newcomers filtered into orchard and farming regions of eastern Oregon; however, the majority settled west of the Cascades. The development of the suburbs

from 1945 onward did much to contribute new demographic features. These bedroom communities were an extension of the urban centers from which they fanned. The distance was usually between 2 to 25 miles. Often they were in counties other than the county of the principal city about which they were clustered. This, therefore, frequently contributed to a significant rise in population of adjacent counties. In addition to these changes certain events created conditions that visibly affected population patterns.[10] For example, during the Great Depression millions of unemployed looked for much-needed jobs in the cities.[11] The Dust Bowl in the central plains States caused farmers and share croppers to desert their wind-parched farms and seek new opportunities, while the Agricultural Adjustment Act encouraged thousands to leave the south.[12] Later, both World War II and the Korean Conflict created millions of new jobs in urban centers.[13] These and other influences contributed to the imbalance between eastern and western

[10]Gerald D. Nash, The American West in the Twentieth Century (New Jersey: Prentice-Hall, Inc., 1973), in passim.

[11]Arthur Schlesinger, Jr., The Crises of the Old Order, 1919-1933 (Boston: Houghton Mifflin Company, 1957), pp. 248-251.

[12]Arthur Schlesinger, Jr., The Coming of the New Deal (Boston: Houghton Mifflin Company, 1959), p. 379.

[13]Nash, The American West in the Twentieth Century, in passim.

Oregon and for the shift of population from rural to urban centers.

Population changes in the 1930 census did little to alter severe malapportionment. The legislature gave a slight nod of recognition to reapportionment in 1931 for the house and in 1933 for the senate, but the changes were merely fractional in most instances, and in the reapportionment of the house only two counties, Deschutes and Klamath, had substantial gains. Thorough reapportionment was lacking. Multnomah County, which contained approximately 35% of the state's population received no additional representation.

Many reasons could be given to explain the legislature's failure to act. One was certainly the city's, the state's, and the nation's preoccupation with the ills of the Great Depression. Cities like New York, Chicago, and Portland were weighted down by the oppressions of the times.[14] This preoccupation was soon followed by the concerns of World War II. Little effort was made to pursue serious and lasting remedies for the ever-increasing problems cities were experiencing as a result of their sharply rising populations. This was certainly true of Portland, for although some people noted Oregon's failure to live up to its constitutional mandate, it was to be the late

[14]Schlesinger, The Crises of the Old Order, in passim.

forties, the fifties, and the sixties that Oregon, along with the nation, was to feel the intense heat of the reapportionment controversy.

In 1949 two bills purporting to ease or resolve the state's legislative malapportionment were introduced into the legislature. Statements drawn from one side or another and debates between opposing sides on the issue appeared continually in newspapers and journals. The tenor of these debates was very similar to the one between Senator Richard Neuberger of Multnomah County and Senator Philip Hitchcock of Klamath County, published in the Magazine Section of the Sunday Oregonian of October 30, 1949. Many of the thoughts expressed by each man are illustrative of the attitudes and philosophies that were to dominate Oregon and the nation throughout the next few decades.

Senator Neuberger represented the populous urban interests and saw the solution to Oregon's problem in the adherence to the democratic majoritarian philosophy of government which demanded population as the criterion for determining representation, a philosophy adaptable to the reapportionment provision of the Oregon Constitution. The Senator was willing to concede that no county should have more than 30% of the state's representation. There were reasons underlying his compromise; especially the importance of gaining support from other counties was essential for securing some equitable representation for Multnomah County. Likewise,

strong fears prevailed that a true observance of the constitutional mandate as interpreted by the urban group would create an imbalance in the legislature with Multnomah County's large numbers dominating it. To allay these fears, gross inequities in other counties, such as Klamath and Lane Counties, were quickly pointed out. But Senator Hitchcock drew other inferences from the situation. It was not a question of majoritarian rule; rather it was the reliance upon the philosophy of republican government with the system of checks and balances designed to protect minority interests and rights. Believing the nation's government to have been based on majoritarian rule was "inaccurate."[15] The Senator further envisioned the fulfillment of the constitutional mandate with Senator Neuberger's interpretation as a step toward triumvirate rule in the legislature by "three industrial counties of the state of Oregon."[16] Representing the less populous, agrarian-oriented counties, Senator Hitchcock also noted that it was true during the adoption of the Oregon Constitution that substantial population inequities existed. Still the state as a whole had most of the same interests. Oregon had been primarily an agriculturally based economy. Now the fears grew out of the obvious differences of interests in

[15]"Should the Oregon Legislature be Reapportioned?" Oregonian, October 30, 1949, Magazine Section, p. 9.

[16]Ibid.

the state due to industrialization, or as the Senator suggested in comparing 1859 and 1949: "There was no segregation of the population into classes with widely diverse interests as there is today."[17] Would the interests of a metropolitan or suburban community be injurious to the interests of the less populous rural community? If so, how would its voice be heard above the overwhelming cries of the urban complex?[18]

To Senator Neuberger and his followers the problem was clearly a question of rotton boroughs, or grossly under-represented majorities. To Senator Hitchcock and his followers the problem was protecting minority rights and interests in the event of a possible avalanche of majority control by those of completely diverse backgrounds and interests. The activities, attitudes, and philosophies of each individual or group were greatly determined by its sympathy for one side or the other. In the most extreme forms each side believed in strict conformity to its criterion in the determination of representation, for the urbanites it was population and for the ruralists it was area or interests tied to territory.

[17]"Should the Oregon Legislature be reapportioned?" Oregonian, October 30, 1949, Magazine Section, p. 9.

[18]"Reapportionment," The Oregon Voter, 35 (October 8, 1949); 3-8.

Those who hailed the population standard had several advantages giving support to their cause. Gross inequities were a fact and were the result of population change. The Oregon Constitution had stipulated population and the resultant ratio to be the basis for representation. A sad discrepancy between Oregon constitutional law and its enforcement prevailed. Also, the use of population as a criterion was advantageous because it was statistically measurable and, therefore, a relatively reliable index. Moreover, the large metropolitan areas of the nation were thrusting upon the country a forceful political identity and an awakening of power to be reckoned with. The force against which the battle was to be waged was equally formidable. Those who hailed the area standard had the advantage of a malapportioned legislature capable of stiffling legislative reapportionment action. Rural interests had a century of dominance in the legislature and the identity of rural America was embedded in the history of the state and the nation. Also, area was an unchangeable, measurable standard, and in Oregon 2/3's of the area was east of the Cascades in the large agricultural regions. This boast could counteract the population standard which threatened to deprive this eastern region of much of its representation and, consequently, its power in the legislature. Moreover, the insistence upon the philosophy of republican

government with checks and balances designed to protect minority rights was neither vacant nor obsolete. The problem remained. How was representation to be interpreted? As the reapportionment controversy loomed high on the horizon of Oregon politics, a solution was found. However, during the following decades reiterations and accentuations of these two poles of conviction arose interspersed with numerous modifications.

In view of the sharp rise of public sentiment and the onrush of political debate, it was no surprise to see a reapportionment measure on the November 7, 1950 ballot. Enough signatures had been procured for the initiative petition. Some of its most notable items proposed as an amendment to the constitution were increasing the number of senators to thirty-six, allowing at least one representative for each county, requiring a ceiling of one-fourth the legislature's seats to any one county, and enlarging reapportionment enforcement to the Secretary of State should the legislature fail in its duty or giving the Supreme Court jurisdiction should both fail. It was a compromise designed to provide some protection for ruralists and to offer some equity for urbanites. But those who would have the most to lose made the greatest protest. They were labor and other metropolitan interest

groups who opposed the proposal and urged voters to "preserve our right to equal representation."[19] The election returns showed 190,992[20] yes votes and 215,302[21] no votes. The initiative of 1950 was defeated by approximately 24,310 votes. Perhaps the most significant role played by the 1950 measure was its inestimable value as a testing ground for 1952. What was lacking in 1950 was very much apparent in 1952. Political reality had made itself felt amongst politically oriented groups and individuals. Doubtless, the reasonable recourse was to reassess views. The jockeying for new leadership within the Young Republicans was an example. Leading the College League of the Young Republicans in strongly dissenting from the views held by the major forces of the Young Republicans, Clay Myers' repeated efforts for acceptance and ascendancy were rewarded by his capturing the chairmanship of the Young Republicans and, with the assistance of his group, redirecting the Young Republicans' attitudes on reapportionment.[22] Likewise, influence was felt in the Young

[19]State of Oregon, Oregon Voter's Pamphlet, November 7, 1950 (Salem, Secretary of State's Office, 1950), p. 34.

[20]State of Oregon, Oregon Bluebook, 1963-1964 (Salem, Secretary of State's Office, 1963), p. 203.

[21]Ibid.

[22]Interview with Clay Myers, Oregon Secretary of State, Salem, Oregon, January 2, 1976.

Democrats with Walter Dodd, a University of Oregon professor of political science and a knowledgable researcher on Oregon reapportionment, persuasively making his expertise and credo known. The Non-Partisan Committee for Constitutional Reapportionment came into being as a result of the concerted efforts of the League of Women Voters, the Young Republicans and the Young Democrats. To gain the League of Women Voters' support, the Young Republicans approached the Young Democrats to form the Non-Partisan Committee for Constitutional Reapportionment with bi-partisan representation.[23] Effective backing was also contributed by organized labor and other urban allied groups. Added to this political strength was newspaper support[24] from the Oregonian, the Oregon Journal, and the Oregon Statesman as well as "two of eastern Oregon's most important dailies, the Bend Bulletin and the Pendleton East Oregonian."[25]

On November 2, 1952, an initiative petition amending the constitution and affirming its basic content of an apportionment based on population and the population ratio was presented to the electorate. Features of the initiative petition that might be considered attractive to the people

[23]Interview with Clay Myers, Oregon Secretary of State, Salem, Oregon, May 24, 1976.

[24]Baker, "Reapportionment by Initiative in Oregon," p. 512.

[25]Ibid.

were that it contained the spirit of the original constitutional provision providing population and its ratio formula as the basis of representation; it incorporated the 1950 section which enlarged reapportionment jurisdiction by guaranteeing proper enforcement through the ultimate review of the Supreme Court if necessary; it left the maximum senate seats at thirty avoiding further tax burdens that the 1950 specifications of an additional six members might have caused. But probably the most significant factor assisting the measure was the belief that adherence to the Oregon Constitution meant compromise for both area and population philosophies of government.[26] This was the reason for the League's sudden change from its adamant stand against literal interpretation of the constitution. It was also a belief held by the Young Republicans, and Clay Myers, and it was publically applauded by the press.[27] The 'major fraction' section of the constitution was the key. According to the rules of 'major fraction,' "once a county or district has obtained more than half a ratio it is ipso facto entitled to a member before another county or district having more than 1 1/2 ratios is entitled to additional representation.[28]

[26] Oregonian, April 28, 1952.

[27] Ibid.

[28] League of Women Voters, "Reapportionment," (Portland, OR.: November, 1951), p. 5.

With the assumption that the total population for Oregon was about 1,500,000, the League of Women Voters believed:

> If it takes approximately 50,000 people (the ratio) to elect a senator, any county that has 25,001 people is entitled to one senator because it has at least one person over one-half the number required by the "ratio" needed for one senator. Each district with a major fraction of a "ratio" (25,001), or a full ratio (50,000) is assigned a senator. Then those districts with one full ratio plus a major fraction (75,001) or two full ratios (100,000) receive a second senator. This is continued until the thirty senators are assigned. It is apparent from this procedure that the heavily populated counties (Multnomah) may be left with a major fraction of or a full ration or more for which they receive no legislator. The following examples are for senatorial representation:
>
> Benton Co. with pop. of 31,500 which is major fraction of 50,000 receives one senator.
>
> Clackamas Co. with pop. of 86,600 (50,000 plus 36,000) gets two senators.
>
> Lane Co. with pop. of 125,000 has 2 full ratios but less than the major fraction needed for third senator so gets two senators.
>
> Mult. Co. with pop. of 468,000 has 9 full ratios but there are not enough senators to fill it out so they get 7 senators.
>
> Under this system, established in our state constitution, the smaller counties are given full representation first. The larger counties receive what is left. This is not area and interest, nor straight population representation, but it represents a compromise between the two theories.[29]

Many seemed to have thought this was the intent of the 1952 initiative petition. In fact, Shirley A. Field who was then a practicing attorney and one of the drafters of the amendment unequivocally stated the 'major fraction' rule as

[29]League of Women Voters, "Reapportionment," (Portland, Or.: November, 1951), p. 5.

conceived by Clay Myers was the intent of its framers. Such interpretations certainly softened the prospect of any adherence to the 'pure' population principle and were contributive to wielding impressive voter power.

All these desirable factors were instrumental in securing passage of the measure. It was adopted by an overwhelming majority of approximately 163,258 votes (194,292[30] no votes and 357,550[31] yes votes). If the passage of the 1952 constitutional amendment was looked upon by observers as a political truce or the end of the reapportionment controversy, they were very mistaken. While many legislators were concentrating on refinements of reapportionment in matters such as subdistricting or election by position number, others were either still attempting to persuade the legislature, the courts, and the electorate to adopt either a federal plan insuring each county a senator or representative or pushing for some newly conceived 'balanced plan' more favorable to ruralists than the 1952 measure.

In 1953 Representative David Baum of La Grande, whose constituency would be effected by observance of the new constitutional mandate, filed suit against the 1952

[30] Oregon Bluebook, 1963-1964, p. 203.

[31] Ibid.

amendment "asking for a declaratory judgment that the amendment was invalid."[32] His principal argument was that the extension of jurisdiction to the Oregon Supreme Court was a violation of the separation of powers. Baum took the position that reapportionment was solely a legislative function. The circuit court decided for the amendment and upon appeal the Oregon Supreme Court upheld the lower court's judgment.

Understandably eastern Oregon felt the loss of power in the legislature. The predominance of urban interests to the detriment of rural interests continued to be their main concern. Past arguments both forceful and weak continued to be reiterated in the ruralist's defense. Basic to some of them was the strong belief in the 'solid virtues' of the farmer. Because of "his honest industry, his independence, his frank spirit of equality,"[33] and "his ability to produce and enjoy a simple abundance,"[34] the farmer was admired and extolled as the ideal man. During the 18th century the subject or hero was the yeoman farmer. But commercialization, industrialization, and urbanization progressively destroyed the facts upon which

[32]Legislative Committee on Reapportionment, Legislative Reapportionment Do-it-Yourself Kit (Salem: State Printing, /1961/), p. 10.

[33]Richard Hofstader, The Age of Reform, (New York: Vintage Books, 1955), p. 23.

[34]Ibid.

this belief was built and as this diminished it gave way to greater fancy and fiction. Without discrimination this pervasive belief, which historian Richard Hofstader had so aptly termed "the agrarian myth,"[35] was increasingly used to include most all aspects of rural life and those who participated in it. In 1926 the tone of the argument in Oregon was simple and direct. It stated:

> On the average, the outside counties elect members whose mental and moral stature is superior--on the average, we repeat--to those elected by the Portland vote. Often the large city needs protection against the purposes and policies of its own elected legislators.[36]

By 1954 a more sophisticated approach was accepted, yet the undercurrent of the agrarian myth was nonetheless present. In the Oregon Voter Ralph T. Moore wrote:

> There is no intent herein to indict urban voters as such. They are fully as intelligent and competent as rural voters. But they are insulated from issues and candidates to a far greater degree by circumstances that cannot be voided. It follows that they miss the mark in appraisal more often than do rural voters and through no fault of their own.[37]

The Vale Enterprise agreed:

[35]Richard Hofstader, The Age of Reform, (New York: Vintage Books, 1955), p. 23.

[36]"Legislative Apportionment," Oregon Voter 46 (September 25, 1926), 4.

[37]Ibid. March 20, 1954, p. 18.

> Ask any representative at Salem who it is that has the greatest freedom of personal judgment, the representatives of rural areas or those from highly populated areas? He will tell you without much hesitation that the political pressure from pressure groups exerted for Multnomah County lawmakers, for instance, would quickly lead to much capricious, irresponsible legislation were it not for the stability given the assembly by its rural contingent.[38]

Dissatisfaction with Oregon's amended reapportionment provision reached new heights after the September, 1961, Oregon Supreme Court decision of In re Legislative Apportionment. In the 1961 legislative session, the house and senate passed House Bill 1665 which was a reiteration of the intent Clay Myers, Shirley Field, the League of Women Voters and others had had in drafting and sponsoring the 1952 constitutional amendment. H. B. 1665 supported the assumption that all counties registering a major fraction ratio were entitled to their representation before counties with ratios allowing them two or more legislators were given their additional representation. H. B. 1665 became Chapter 482 of the Oregon Laws, 1961. The problem was that only 30 senate seats and 60 house seats could be alloted among the thirty-six Oregon counties. If major fractions were thus treated, then counties with substantial ratios like Lane, Jackson, or Multnomah Counties would be given whatever was remaining. In the 1961 apportionment,

[38]"Legislative Apportionment," Oregon Voter 46 (July 30, 1955, p. 4).

Multnomah County was deprived of two whole ratios, one for the house and one for the senate. Lane and Jackson Counties had no representation for their major fraction ratios.

Attempting to redress this inequity, Vern Cook, a newly elected Multnomah County legislator, took action. As attorney for petitioners--Charles McKinley; Howard Dean, a political science professor at Portland State College; and Donald Balmer, a political science professor at Lewis and Clark College--he sought judicial remedy. He petitioned for review and in his brief was joined by Dirk Snel and Reuben Lenske. The latter also presented a brief amicus curiae pro se, that is a brief presented by a person having no right to appear in court but who is allowed in a suit to introduce argument, evidence, or authority to protect his interests. Another petitioner was Eleanor Kafoury represented by William McLennan. Edward Fadeley, state representative from Eugene, submitted his own brief. The Attorney General, Robert Thornton, and his assistant, Louis Bonney, likewise offered opposition to the legislation in their brief of amicus curiae. Those who regarded Chapter 482 as constitutional and as equitable as possible were Portlanders Clay Myers, Robert Jones, Ken Maher, and Victor Atiyeh. From Hood River and Eugene were George Annala and F. F. Montgomery, respectively. These men had attorneys Edwin Peterson of Portland and Douglas Spencer of Eugene arguing

their cause in a brief amicus curiae. Justice J. O'Connell delivered the court's opinion. He temporarily disregarded Multnomah County's major fraction and took issue with the legislature's failure to apportion an additional representative to the 12th senatorial district.

The plan had given 7 senators to a county having a ratio of 8.868. O'Connell objected saying:

> ...it is impossible for us to conceive of a reasonable interpretation of Article IV, 6 which would permit the legislative assembly to subtract a whole number from the quotient resulting from the application of the constitutional formula for determining representation in the state senate.[39]

The ratio was arrived at by simple division of the state's total population by 30 senate seats or 60 house seats, depending upon which branch was being considered. At this time Multnomah County's population was high enough to register a senatorial district ratio of 8.868 meaning 8 was the whole number ratio entitling the county to 8 senators and .868 was the remaining major fraction. For the house seats Multnomah County had 17.736, 17 being the whole number ratio for which the County could expect representative seats and .736 was the major fraction. The apportionment plan being contested had favored some counties with major fractions and neglected to allot the legislative seats to two of Multnomah County's whole number ratios. The Justice emphatically stated "representation is based

[39] In re Legislative Apportionment, 228 Oregon 570.

on population ratio"[40] and the "constitution makes no mention of the use of any other factor in making apportionment.[41] Upon this premise the legislature has no authority to modify apportionment so as to ignore the results of this arithmetic process; whole number ratios cannot be disregarded. Once apportionment for whole numbers was achieved then latitude was deemed permissable with the legislature's "power to adjust the major fractions"[42] for the remaining seats. Words of caution were given by Justice O'Connell when he admitted the legislature's power to combine districts or to determine which major fraction county should be given representation. These actions were to be considered adjustments to "the constitutional formula so that it can be made to work."[43] In other words all adjustments were to be subordinate to and in conjunction with this ruling.

This was the first incident of Supreme Court action based on enlarged jurisdictional powers granted it by the 1952 amendment which guaranteed enforcement of the constitutional provision. The novelty of the action incensed many rural legislators and rural-oriented groups and individuals.

[40] In re Legislative Apportionment, 228 Oregon 570.

[41] Ibid.

[42] Ibid., p. 571.

[43] Ibid., p. 573.

In response to the decision they were successful in drafting and placing on the November, 1961 ballot a reapportionment initiative. Of the sixty-five representative seats asked for, thirty were to be permanent with the remaining thirty-five to be apportioned among counties on the basis of population. Senate seats were to be increased to thirty-five. The measure failed, with 325,182 no[44] votes and 197,322 yes[45] votes being cast. The margin was an overwhelming 127,860 votes. This was Oregon's final answer as to its position on state legislative reapportionment and within the same month Oregon's stance was to be reaffirmed by the United States Supreme Court.

[44] Oregon Bluebook, 1963-1964, p. 202.

[45] Ibid.

## CHAPTER II

## BAKER VS CARR

During the Warren Court's tenure, many decisions of import were rendered under the aegis of the Fourteenth Amendment's Equal Protection Clause. Among them were such decisions as the civil rights of black people and the quality of the criminal justice system. Whatever a person's social, economic, or political views, it is clear that the court's achievements in the realm of civil liberties cannot be dismissed. But paradoxically enough, by its interpretation and application of the Equal Protection Clause as a basis for the protection of individual voting rights, the court bestowed upon the nation its assent to a democratic majoritarian philosophy. Subject to the most enthusiastic accolades and to the severest criticism, Baker vs Carr (1962) was the Warren Court's first and most crucial attempt to deal with malapportionment which had become a much publicized problem in the nation from the late forties through the fifties and sixties. This great landmark decision of the Supreme Court began the series of reapportionment cases reflecting a majoritarian philosophy, paved the way for the attractive

nationally coined-phrase 'one man-one vote', and gave credence to the belief that each person was entitled to the same weight his vote would carry as compared to his counterpart's in other constituencies. Besides the Supreme Court's initial acceptance of the malapportionment problem, the decision found the court, in effect, designating itself as the responsible body to whom the resolution of the problem should be addressed. This posture coupled with the majoritarian philosophy which most of the Warren Court seemed to have espoused was the kindling that lit the fire of controversy among court commentators. Much of the content in the justices' opinions in Baker was devoted either to the defense of or the rebuttal of these two points. So paramount was the concern over the judiciary's role that little was said or observed about the precise way the court embraced the responsibility. This serious neglect warrants a re-examination of Baker vs Carr.

Baker vs Carr originated in a suit brought by Charles Baker against Tennesse's Secretary of State Joe Carr. These men were natives of Tennesse who had moved from the country to the city and played active roles in state politics. Charles Baker had become the Mayor of Millington and a Millington representative on the Shelby County Quarterly Court in 1950. Millington was a town almost grown into a suburb as a result of the tremendous growth

created by its naval base during World War II. Such growth had drawn Millington and Memphis together making whatever distance there was in miles seem insignificant. The Shelby County Quarterly Court to which Millington sent a representative was "a fiscal, legislative body that ran the affairs of a rapidly urbanizing metropolitan area where more than 600,000 people then lived."[46] By 1954 Baker had been elected chairman of the committee. Memphis and Charles Baker were to feel the impact of increasingly complex and pressing urban problems which required appreciably greater finances. However, the inequity of the state's revenue distribution, because of a severly malapportioned legislature, had left metropolitan governments like Memphis' in straits. Having been prompted by the desire to alleviate this situation, Charles Baker filed suit against the 1901 Tennesse reapportionment statute or more specifically against Joe Carr, the Secretary of State. Like so many of its sister states, Tennesse had experienced a great shift in population from rural areas to large metropolitan centers like Nashville, Memphis, Knoxville, and Chattanooga. Yet, political power had not followed this shift. It had been retained by the more sparsely populated, agricultural regions of the state

[46]Gene Graham, One Man One Vote (Boston: Little, Brown, and Company 1972), p. 17.

leaving urban areas grossly underrepresented in the state General Assembly. Charles Baker's complaint alleged that the 1901 statute denied him and other persons residing in similar type locale the Fourteenth Amendment's equal protection of the laws "by virtue of the debasement of their votes."[47] The suit was dismissed by the federal district court on the grounds that "it lacked jurisdiction of subject matter and no claim was stated upon which relief could be granted."[48] The case was then appealed to the United States Supreme Court. Baker vs Carr was heard by the Supreme Court and was decided March 26, 1962. Writing the majority opinion for the court was Justice William Brennan whose order of issues for condideration fell into three categories: jurisdiction, standing, and justiciability. A format clearly designed to answer the federal district court's dismissal order in the manner in which the lower court had answered the complaint.

To arrive at a greater perception and perspective of Baker, it is best to follow the sequential patterns laid down by the court and to include other Supreme Court decisions. Among them are Brown vs The Board of Education and Reynolds vs Sims, handed down by the Warren Court in 1954 and 1964 respectively. Also there are Mahan vs Prichard,

[47] Baker vs Carr, 82 S.Ct. 694.

[48] Ibid.

a product of the Burger Court in February of 1973, and Luther vs Borden, the result of the Taney Court's deliberations in 1849.

The three categories in Baker are distinguishable by definitions commonly found in standard or legal dictionaries. The court's power or authority to review a case, which in effect means to interpret and apply the law, is jurisdiction. The position from which legal rights and duties may be asserted or enforced is standing. Finally, the determination of whether it is proper or appropriate for the court to hear a case is justiciability.

## CHAPTER III

## JURISDICTION

In addressing itself to the problem of jurisdiction, the court in the majority opinion of Baker declared:

> It is clear that the cause of action is one which "arises under" the Federal Constitution. The complaint alleges that the 1901 statute effects an apportionment that deprives the appellants of the equal protection of the laws in violation of the Fourteenth Amendment...[49]
>
> We hold that the District Court has jurisdiction of the subject matter of the federal constitutional claim asserted in the complaint.[50]

With the admission of federal jurisdiction as sought by the appellants in Baker under the Equal Protection Clause, the Supreme Court recognized the existence of a political right to which all individual voters were entitled. The court assented to the proposition that the political right to be protected was equal voting weight; a doctrine more clearly enunciated in later decisions.

Implicit in the court's acceptance of jurisdiction over state legislative reapportionment as written by Justice Brennan in the majority opinion is the admission of the

[49] Baker vs Carr, 82 S.Ct. 700.

[50] Ibid., p. 703.

premise that just as every man is equal before the law in the judicial system, so too every man is equal before his government. The equal relationship enjoyed by the litigant and the voter to their several bodies necessarily infers a 'one to one' relationship. Such a basis furnishes the logic for granting to every voter the individual political right to an equal weight of his vote in the electoral process.

The suggestion of a parallel to be drawn between Baker vs Carr and previous Warren Court decisions under the Equal Protection Clause further punctuates Justice Brennan's theorem. Brown vs The Board of Education and Baker vs Carr have drawn frequent comments in this regard, probably because both cases were and are landmark decisions deeply effecting social history and political history. To both cases the court applied the Equal Protection Clause of the Fourteenth Amendment extending individual rights. Also, Baker was the assertion of a political right under a civil rights amendment whereas its predecessor, Brown, was the declaration of a civil right under an amendment of the same purport. It is these qualities that lend themselves to the consideration of the Supreme Court's parallel usage of this very familiar legal standard, one which even Justice Frankfurter alluded to in his dissent:

> Appellants appear as representatives of a class that is prejudiced as a class, in contradistinction

> to the polity in its entirety. However, the discrimination relied on is the deprivation of what appellants conceive to be their proportionate share of political influence. This, of course, is the practical effect of any allocation of power with the institutions of government.[51]

Frankfurter's remarks were two fold. They served as an admonishment and a disclosure of what the Justice felt was the court's subsequent abuse of its application of the Equal Protection Clause. The coincidence, thereby, offered an open door for the Supreme Court's advancement of a majoritarian philosophy of government. But the question now presents itself; was there substantial cause for Justice Frankfurter's objection? The key lies somewhere between the parallel usage of the Clause and the premises upon which it was applied.

In Brown vs the Board of Education the court broadened the base of the Equal Protection Clause by establishing the civil right of equal educational opportunity (the subject to be protected was the Negro, more generally racial minorities, and the object to be achieved was equal educational opportunity through school desegregation). In Baker vs Carr the political right of the individual voter to 'equal' voting weight at the polls was acknowledged by the court under the Equal Protection Clause (the subject here to be protected was the individual voter and the

[51] Baker vs Carr, 82 S.Ct. p. 754.

object to be achieved was "fair and effective"[52] representation through equalized voting weight). A brief glance indicates obvious similarities. Both were extensions of constitutional rights under the same clause. But the essence of the parallel does not come from the expansion of the equal protection principle or rule; rather it comes from the subject to which the principle is applied and the object it endeavors to accomplish.

Racial status has its beginning and end in the single and uncontrollable factor of birth. That it reaches group dimensions is attributable only to others' possession of it, and the degree of solidarity within the group varies and is dependant on the pressures directed for or against this sole factor. Therefore, the people of the group represent a "class"[53] of individuals. In a statement made by the American Civil Liberties Union of Oregon in testimony before the Oregon House Elections Committee, April 1965 the court's reasoning was aptly stated:

> The American Civil Liberties Union of Oregon endorses the principle that all men are equal before the law and are, therefore, entitled to equal votes and to equal representation in state legislative assemblies. This principle of equality of representation is embodied in the equal protection of the laws clause of the Fourteenth Amendment

[52] Reynolds vs Sims 84 S.Ct. 1383.

[53] Baker vs Carr 82 S.Ct. 754.

to the United States Constitution.[54]

The result of the court's premise relying on its analogous reasoning and application in Brown and Baker has been to create what the ACLU's remarks suggest; equality before the law and equality of voting weight in participating within the republican structure of government are synonymous in nature.

To achieve equality people must be conceived as numbers in a population figure; regard for historic, geographic, economic, political, religious, and other special interests is necessarily illogical. Considerations such as these create inequalities because they are highly variable factors, a reality well demonstrated in politics. Ironically, those who praise the Warren Court for Baker vs Carr and Reynolds vs Sims are sometimes the same individuals lamenting the Supreme Court's failure to solve the gerrymander problem. A foremost example is Gordon Baker, an out-spoken critic of state reapportionment during pre-Baker times. In an essay devoted to the gerrymander, Mr. Baker commended the court for past reapportionment actions and proceeded to mention:

> The most troublesome question, however, not only remained unsettled, but loomed even larger in significance. The gerrymander--the intentional manipulation of districts for partisan or factual advantage--comprised in its various

[54]House Elections Committee, SJ1, Exhibit 6 (Salem, Or.: April 14, 1965).

> forms, the heart of the political thicket that the judiciary skirted most gingerly. Moreover, the Supreme Court had paradoxically encouraged the potential for widespread gerrymandering, while gradually developing a single-minded quest for mathematical equality. In particular two decisions in the spring of 1969 laid the groundwork (no doubt, unintentionally) for proliferating the more advanced and subtle forms of discriminatory cartography. Inevitable legal challenges will pose a dilemma for the courts: whether to allow the ideal of representative equality to be undermined by pervasive gerrymanders, or whether to elaborate the standard beyond mere mathematical equality.[55]

Mr. Baker has accepted the 'one-man, one-vote' principle as applied in Baker, but he has failed to grasp its full significance. The Supreme Court unconsciously encouraged widespread gerrymandering; however, the groundwork was laid in 1962 with Baker vs Carr. In so doing the court developed a new majoritarian philosophy. Representation was conceived on the equality-population basis. With the court's premise, gerrymandering could not exist. It was and is a term creating inequality by the very fact that it admits to some type of special interest, whether it be partisan ties, geographic boundaries, or the like. The problem, therefore, is the reconcilability of these two concepts. To propose an elaboration of "the standard beyond mere mathematical equality"[56] is to suggest that the court nullify its adamant stand on 'one-man, one-vote' and turn

[55] N. W. Polsby, ed., Reapportionment in the 1970's (Berkeley: University of California Press, 1971), pp. 121-122.

[56] Ibid., p. 122.

back to apportionment standards of pre-Baker times. The Burger Court in its Mahan vs Prichard decision took a definite step in this direction. The case involved Virginia's House redistricting statute which was challenged on the basis that there were impermissible population variances in the districts, that the multimember districts diluted representation, and that the use of the multimember districts constituted racial gerrymandering."[57] The court ignored the racial gerrymandering issue, but by its punctuated affirmance of "the State's rational objective of preserving the integrity of political subdivision lines"[58] and by its allowance for greater percentage flexibility in population variances among districts, it backed away from Baker vs Carr and Reynolds vs Sims and walked right into the concept underlying the gerrymander, e.g. the preservation of district lines because of politics, history, natural boundaries, or other special features.

Another consequence of the Warren Court's majoritarian philosophy and reasoning is that Baker vs Carr and more especially Reynolds vs Sims with its adjoining decision Lucas vs Forty-Forth General Assembly of Colorado have reflected a change in the fundamental ideological concept of the division of power as manifested in the balancing

[57] Mahan vs Prichard, 41 LW 4277.

[58] Ibid.

version of the separation of powers. The Federal Constitution derived its balancing version of the separation of powers from adopted state constitutions, most particularly that of Massachusetts which had been chiefly framed by John Adams in 1780.

The doctrine of the separation of powers had grown through several centuries of English and French history and its adoption in framing governments had been urged for one or several reasons as noted by W. B. Gwyn in his monograph The Meaning of the Separation of Powers. They were for efficiency in government, for fairness to the common good in legislating laws, for assurance that administration of the laws was impartially given and that administrators were subject to them also, for allowance that representatives of the people might be able to make executive officers accountable for abuses of their power, and finally for the establishment of "a balance of governmental powers."[59] It was John Adams who laid much of the initial groundwork for the acceptance in American political circles of the balancing version of the separation of powers. He introduced the threefold concept of governmental branches and their functions. The judiciary was his important inclusion. In his writings of 1776, Adams was solicitious about the weakness of the judiciary. It was his belief and fear that

[59]W. B. Gwyn, The Meaning of the Separation of Powers (New Orleans: Tulane University 1965), p. 127-128.

the judiciary would not survive a struggle between the executive and a democratic unicameral legislature; a legislature of such composition "would undermine the courts."[60] The solution seemed to be the adoption of:

> A mixed constitution with an aristocratic chamber in the legislature to hold the balance between the monarchic executive and the democratic legislative chamber. Adams thus proposed two overlapping sets of checks and balances; the three branches of the government and the monarchic, aristocratic, and democratic parts of the legislative branch.[61]

John Adams had endeavored to incorporate these ideas into constitutions of the South, such as Virginia, as well as many other states. But Virginia's political leaders and the leaders of some other states regarded his ideas with disdain. They succeeded in drafting constitutions highly majoritarian in philosophy and content. This was manifest in their provisions for popularly elected legislatures.

From Adams' writing and the Massachusetts Constitution, wherein the Senate and the House were distinguished in apportioning the former by taxes and the latter by people, to the Constitutional Convention of 1787, a shift in emphasis became apparent. Adams' basic structural formulation, which was one of the features giving the Massachusetts Constitution such great longevity, was to be the cornerstone of American

[60] W. B. Gwyn, The Meaning of the Separation of Powers (New Orleans: Tulane University 1965), p. 117

[61] Ibid.

constitutionalism. The concern became centered upon legislative imbalance as a result of inadequate state constitutional provisions and the rising tide of popular despotism exemplified by Shay's Rebellion. Probably the most vocal and the most acutely aware of their constitution's defects were Virginians such as Thomas Jefferson and James Madison. They and many others had seen with the passage of time and the rapid occurence of changing events, the importance of the balancing version of the separation of powers, the need for its further development, and the utmost urgency of its acceptance. Popular despotism was an ugly reality during the post-revolutionary war and pre-convention years. Its threat was vividly portrayed in Gordon Wood's book, The Creation of the American Republic. Through observations of men made during this era, Wood captured the fears this ominous head created:

> "Wherever the real power in a Government lies," Madison told Jefferson, "there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents." The people, it seemed, were as capable of despotism as any prince; public liberty was no guarantee after all of private iiberty. At the beginning of the Revolution, wrote Madison, Americans obviously had not perceived this danger to the private rights of property

> from public liberty. "In all the Governments which were considered as beacons to republican patriots and law givers, the rights of persons were subjected to those of property"; throughout history the poor had always been sacrificed to the rich. In 1776 Americans had assumed that their society was unique--so egalitarian that both rights coincided, so different that "a provision for the rights of person was supposed to include of itself those of property." And Americans naturally inferred, said Madison, "from the tendency of republican laws"--like the abolition of primogeniture and entail--"that these different interests would be more and more identified." But alas! "experience and investigation" had eventually taught Madison that America was not different from other societies, that equality of condition was a chimera. Only a minority, said Madison, "can be interested in preserving the rights of property." Yet what could be done? In 1786 a New Jersey critic of this majoritarian tyranny had argued that there were occasions when the legislature must ignore the voice of its constituents. "A virtuous legislature will not, cannot listen to any proposition, however popular, that came within the description of being UNJUST, impolitic, and unnecessary." "Then we are not a republican government," was the formidable reply, "for the evident significance thereof is that the people (the majority of the people) bear rule, and it is for them to determine wether a proposition is UNJUST, IMPOLITIC, and UNNECESSARY or not."[62]

The remedy for this threat which the delegates to the Constitutional Convention sought, was solidly rooted in John Adams' balancing version of the separation of powers. Although the mode with regard to the legislature differed from Adams' application of it in the Massachusetts Constitution of 1780 because of the consideration of the union of several states, nevertheless, the principle remained deep and abiding.

[62]Gordon S. Wood, The Creation of the American Republic, 1776-1787 (Chapel Hill: University of North Carolina Press, 1969), pp. 410-411.

Nearly two hundred years later, Chief Justice Earl Warren in Reynolds vs Sims implied modern acknowledgment of the existence of the balancing version of the separation of powers and its vitality when he attempted to reassure all that although both houses of the legislature would be based on population, there were possibilities enabling each body to be differently composed. However, he did not probe into its historic purposes, but rather he noted the most obvious reason for bicameralism as the insurance of "mature and deliberate consideration of, and to prevent precipitate action on proposed legislative measures."[63] Warren assured that difference in numbers between houses, difference in district sizes from which each body could be elected, difference in the length of terms for senators and representatives, and difference in single and multi-member districts could be used by the states to achieve the objective of engendering "differing complexions and collective attitudes in the two bodies of a state legislature."[64] During pre-constitutional times and thereafter most of these methods had been used by one state or another in varying forms. In spite of this fact, Adams chose to build a much firmer foundation by having the legislative branches apportioned differently; an idea readily adopted by New Hampshire in their 1784

[63] Reynolds vs Sims 84 S.Ct. 1387.

[64] Ibid.

Constitution. Interestingly enough Warren's decision in effect declared New Hampshire's 1784 constitutional provision for apportionment unconstitutional. Until November, 1964, New Hampshire had retained the 1784 apportionment section. This contrast gives emphasis to the difference from interpreting and applying the balancing version of the separation of powers in the 1780's and in the 1960's.

# CHAPTER IV

## STANDING

The court, having established its jurisdiction on this foundation of logic, proceeded to the issue of 'standing'. This was the determination of whether there was a position in the Baker vs Carr case from which legal rights and duties might be asserted or enforced. Among the three arguments it was the shortest and the most unnoticed. That it is the least-mentioned issue of the decision would seem to indicate an oversight as to its significance. If so, this is unfair since it contains matters pivotal to the entire case. Justice Brennan made a statement for the majority wherein past judicial action with regard to voting was summarized. In it are elements suggestive of the need for a judicious pause:

> A citizen's right to vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by false tally, cf. United States vs. Classic..., or by a refusal to count votes from arbitrarily selected precincts, cf. United States vs. Mosley..., or by a stuffing of the ballot box, cf. Ex parte Siebold...[65]

[65] Baker vs Carr, 82 S.Ct. 705.

Behind his remark lies the assumption that the 1901 Tennessee statute, in which the General Assembly passed the Apportionment Act abandoning separate enumeration required by an 1870 statute "in favor of reliance upon the Federal Census,"[66] fell within the same juristical rule or standard as United States vs Classic, United States vs Mosley, and Ex parte Siebold. To facilitate an understanding of the validity of this assumption, it is necessary to examine the facts of these cases pertinent to Baker and to review the history and circumstances from which these cases evolved.

Among the Radical Reconstruction measures of 1870 and 1871 were the Enforcement Act of 1870 and its supplementary amendment, the Enforcement Act of February, 1871. The provisions of these acts had their genesis in the extension of Negro suffrage and the subsequent exploits of the Ku Klux Klan and other similar organizations to whose activities much of the South had become an arena. The principle target of the organizations' activities were Negroes, toward them the South's fears of political and racial supremacy were directed. Intimidation ranged from burning crops and homes to physical mutilation and murder. So rampant were these atrocities, that growing public demand forced Congress and the President to act. This humanitarian concern coupled with political motives prompted Congress to adopt the Enforcement Act of 1870, or as Alan Trelease noted:

[66] Baker vs Carr, 82 S.Ct. 705.

> When Congress was finally moved to action in 1870, it was thinking of the coming fall elections as much as the personal plight of Southern Republicans. The Fifteenth Amendment had just confirmed and extended Negro suffrage and empowered Congress to enforce it by appropriate legislation. The Enforcement Act of May 31, 1870, was concerned primarily with the bribery or intimidation of voters, which it made a federal offense, punishable in federal courts. But section 6 made it a felony for two or more persons to deprive someone of any right or privilege of citizenship, or to punish him afterward for having exercised it. And if anyone, in violating these provisions, committed any other crime he was subject to the same penalties provided for that offense by the state in which it was committed. The President, finally, was empowered to use the armed forces of the United States to apprehend violators.[67]

Sadly enough, the victims of these atrocities rarely received redress, and the Supreme Court in 1876 virtually "emasculated the Enforcement Acts by ruling"[68] in United States vs Reese and United States vs Cruikshank "that the federal government could protect civil rights only against their abridgment by states, not individuals."[69]

Yet the Supreme Court upheld fraudulent state interference in elections as a penal offense punishable under federal law. Ex parte Siebold in 1879 was a strong affirmation by the court on this point. The defendant, Judge Siebold of Maryland, had engaged in "stuffing the ballot box"[70]

[67] Alan Trelease, White Terror (New York: Harper & Row, 1971), p. 385.

[68] Ibid., p. 418.

[69] Ibid.

[70] Ex parte Siebold 100 U.S. 379.

to distort election results. Justice Joseph Bradley delivered the majority opinion asserting that Judge Siebold was a state officer and that fraudulent actions such as "stuffing the ballot box"[71] were explicit criminal offenses by state officials for which relief could be sought. It was under federal jurisdiction. United States vs Mosley in 1914 involved a litigation against two state election officers of Oklahoma. The main charge was conspiracy "to injure and oppress certain qualified electors"[72] from exercising their right to vote. The end result of their actions was the omission of certain individuals' ballots from the count. From this conspiracy other charges arose, but it was in reference to the act of omission that Justice Oliver Holmes applied the Enforcement Acts of 1870 and 1871 and declared such an act a criminal offense. Likewise, it was within this context that the often-quoted sentence came into being: "We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box."[73] In United States vs Mosley the principles set down in Ex parte Siebold were reaffirmed. The remaining case cited by Justice Brennan in Baker was the United States vs Classic decision of 1940.

[71] Ex parte Siebold 100 U. S. 379.

[72] United States vs Mosley, 238 U. S. 385.

[73] Ibid. p. 386.

The election laws were extended to include primary elections. As a consequence the conspiracy and actual "alteration of the ballots"[74] cast and the "false certification of the number of votes cast for the respective candidates"[75] by the Commissioners of Elections in Louisiana was criminal under federal statute and therefore within federal jurisdiction.

All three of these cases demonstrate a relatively narrow interpretation of the Revised Statutes relating to those sections drawn from the Enforcement Acts of May, 1870 and February, 1871, and voting rights to be protected. Each one contains specific criminal offenses. But in the assertion of such jurisdiction, particularly the post-Reconstruction decision Ex parte Siebold, federal over state authority is of prime importance. It was on this foundation that Justice Brennan based his assumption that these cases were within the same juristical rule or standard as Baker vs Carr. However, he failed to distinguish the judicial questions in Baker from those he cited. The failure is judicially reprehensible, for the meaning of these decisions and phrases concerning criminal election offenses has been placed in a purely political context. When a juristical standard has been broadened to such a degree, is there not a need for clarification and more careful consideration and attention?

[74] United States vs Classic, 313 U. S. 309.

[75] Ibid.

# CHAPTER V

## JUSTICIABILITY

Probably the most controversial section of Baker vs Carr was the one devoted to the justiciability argument. It contained many references to the judicial doctrine of 'political questions' that Chief Justice John Marshall introduced into U.S. Constitutional law and that was further expanded and elaborated upon by later justices. Invoking this doctrine enabled the court to avoid a confrontation it felt obliged to avoid because of the nature of the issue or the circumstances from which it arose. The volatileness of the legal problem might stem from various sources. Two of the most obvious would be if it was a national issue of extreme emotional import to which the court might go counter, or more likely it might be an infringement upon the powers exercised by the executive or legislative branches of the government. One of the court's milestones in the development of the 'political questions' doctrine was the 1849 Supreme Court case Luther vs Borden with the majority opinion written by Chief Justice Roger Brook Taney. So frequently does Justice Brennan mention and allude to it, that to appropriately examine the justiciability argument of Baker would be accomplished best by first delving into Luther vs Borden.

It was from the Rhode Island setting of the Dorr War in the early 1840's that the court's final pronouncement of Luther vs Borden, February, 1849 came. Before going into specific arguments and opinions, a recapitulation of events leading to the Dorr War is essential.

Due to substantial industrial expansion during the 1830's, Rhode Island experienced a transformation in its economic, social, and political structure. The development of steam power, the creation of new industries, and the renovation of older industries through newly-applied technical inventions were among the immediate causes giving impetus to Rhode Island's shift from a primarily maritime economy to an industrial one. Inherent to this change was the relocation of people, capital, and to a certain extent, industry itself. New centers of growth spotted the rivers and coastal region where steam power was accessible. Urban areas, particularly Providence, eagerly sought to take advantage of the conditions and became the hub of commercial endeavor; whereas, other areas, such as Newport, lagged behind and even diminished in size, either because they lacked the aggressive initiative of their more northern competitor or because the geography of the region was ill-suited to industrial development.

In addition to the harnessing of steam power and the ever-present concern of Rhode Island entrepreneurs to seek economic diversification, the beginning waves of French Canadian and

Irish Catholic immigrants were making themselves felt, particularly in industrial centers. The combination of industrial expansion and an immigrant labor force created a sharp delineation in the character of the urban-rural communities. The urban community reflected an increasingly large number of landless Catholic workers contrasted with the predominately land-owning Protestant rural community whose numbers were comparatively few and in many instances decreasing.

These economic and social changes brought with them a pressing need for political reform both within the context of extended suffrage and the equalization of representation. The former was obviously evident, since Rhode Island still retained its suffrage provision that a man must have $134 worth of real property to be eligible to vote. This qualification coupled with the circumstances, previously mentioned, of the swelling numbers of landless people in the cities made such a provision an anachronism. The latter need for political reform was equally, if not more, apparent.[76]

Further compounding the complexity of the political situation in Rhode Island was the desire of many electors to have a bill of rights. Rhode Island was unique among the colonies in that it continued under the Charter granted to it by Charles II. After the Revolutionary War, most of the

[76]Chilton Williamson, American Suffrage from Property to Democracy 1760-1860 (Princeton: Princeton University Press, 1960), p. 246.

colonies adopted their own constitutions and bill of rights from which much of the Federal Constitution was patterned. Several times during Rhode Island's history, the General Assembly attempted to do likewise, but the British Occupation of 1777 thwarted one attempt and a later effort in the 1820's was shelved by the Assembly and eventually defeated. (This last effort began as an exercise in political pacification rather than a sincere gesture to change the existing government.)

Although Rhode Island continued under a charter government, the colony, later the state, actively participated both in the writing and signing of the Declaration of Independence and in the discussions and decisions of the Constitutional Convention. As a state, the charter government sent senators and representatives to Congress, but this was dimmed in the 1830's by gross inadequacies found in limited suffrage, malapportionment, and the absence of a bill of rights. It was within this political climate that Thomas Dorr and his followers gained prominence.

Thomas Dorr was the son of a Rhode Island merchant, who had extensive experience in trading with China. Being from the merchant class meant being among the socially elite distinction by early nineteenth century standards in Rhode Island. His education reflected this, for among the schools he attended were Exeter and Harvard. From European travel

and study, Dorr became ardently imbued with Jeffersonian ideals, and upon his return to the United States, he applied himself to the study of law. Several years were spent in the practice of law until Thomas Dorr became a politician and was elected a legislator to the General Assembly. Hereupon, Dorr involved himself in efforts to secure suffrage, representation, and judicial reform. At the outset his provisions for reform were moderate, for he only wished to extend suffrage "to middle-class taxpayers and, perhaps, militiamen."[77] But these proposals were turned down by the legislature, and the nucleus of Dorr supporters fell into oblivion only to be followed by a more radical group. It was this group that took affirmative action to correct political abuses by calling a constitutional convention and adopting and ratifying a constitution, which had among some of its provisions the extension of suffrage to all white, twenty-one year old males. The People's Constitution won a majority of votes from the Rhode Island electorate which included the Constitution's newly-enfranchised voters. After its acceptance the Dorrites submitted their constitution to the Governor and the General Assembly of the Charter Government, whereupon it was soundly rejected and in its place, the Algerine Law was passed prohibiting anyone from taking part

[77]Peter J. Coleman, The Transformation of Rhode Island (Providence: Brown University Press, 1969), p. 259.

in the Dorrite movement under the threat of punishment for misdemeanor, high crime, or treason. Defying the Charter Government's action, the Dorrites held elections for the selection of officers and chose Thomas Dorr as governor. They declared this to be the legitimate government and Dorr sent himself on an unsuccessful mission to obtain President Tyler's support and approval. Returning to Rhode Island, Dorr and his followers attempted to seize a small arsenal at Providence, but their efforts were thwarted by a forewarning given to the tiny garrison and by the damp atmosphere which prevented the Dorrite cannon from firing. As Peter Coleman recalled in his book The Transformation of Rhode Island, dense fog also covered the area and as it lifted, Dorr found he had been virtually abandoned by his followers who had crept away unseen. With the choice of arrest or flight, he fled Rhode Island leaving it within the Charter Government's temporary pale of martial law. This abortive attempt and the events associated with it are commonly referred to as the Dorr War. After the incident of the Providence arsenal and an earlier June seizure effort at Chetapatchet, the Charter Government in May, 1843 adopted and ratified a new constitution based largely upon the originally moderate Dorr proposals. With its acceptance by the majority of Rhode Island voters, the old Charter Government relinquished its powers to the new.

From this Rhode Island controversy and insurrection, the Luther vs Borden case arose. Martin Luther, the plaintiff, was known to have been an active Dorrite. Luther Borden, the defendant, was a Charter Government militia man who had broken into Luther's house attempting to secure Martin Luther's person for arrest under the existing law which prohibited involvment in the Dorr movement. Martin Luther's contention was that Borden had unlawfully entered his house, since the Dorr Government was the legitimate government at the time and thus the law under which Borden acted was null and void.

Delivering the majority opinion Chief Justice Taney addressed himself to the practicalities of the court's establishing the Dorr Government's legitimacy. The initial question necessarily involved the actual existence of such a government, or as Taney stated:

> We do not understand from the argument that the constitution under which the plaintiff acted is supposed to have been in force after the constitution of May, 1843, went into operation. The contest is confined to the year preceding. The plaintiff contends that the charter government was displaced, and ceased to have any lawful power, after the organization, in May, 1842 of the Government which he supported, and although that government never was able to exercise any authority in the State, nor to command obedience to its laws or to its officers, yet he insists that it was the lawful and established government, upon the ground that it was ratified by a large majority of the male people of the State of the age of twenty-one and upwards, and also by a majority of those who

> were entitled to vote for general officers under the then existing laws of the State.[78]

A few paragraphs later he noted the immediate problems underlying a court decision recognizing the Dorr Government as the truly existing government during this time and agreeing that the charter government had been annulled by such action:

> ...then the laws passed by the Legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensations to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases criminals.[79]

But aside from these noticeable effects, Taney recognized far more serious implications arising from the arguments presented by the attorneys for the plaintiff. It was this nucleus around which several interpretations of the Guarantee Clause of the U. S. Constitution revolved. The potential impact of these interpretations should begin with a restatement of the Clause:

> The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and an application of the legislature, or the executive (when the legislature cannot be convened) against domestic violence.[80]

[78] Luther vs Borden, 7 Howard 597.

[79] Ibid.

[80] U. S., Constitution, art. IV, sec. 4.

The thesis underlying the pro-Dorr appeal given by Mr. Benjamin Hallett was:

> ...that government is instituted by the people, and for the benefit, protection, and security of the people, nation, or community. And that when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish the same, in such manner as shall be judged most conducive to the public weal.[81]

The Hallett argument was profuse with statements reflecting these principles in one way or another. Little mention was given the Guarantee Clause. Only in an advancement of a "proposition as to the theory of American government,"[82] which was a reiteration primarily of the peoples' sovereignty and their right to adopt a form of government, was the phrase tacked on "subject only to a limitation provided by the United States Constitution, that the State governments shall be republican."[83] It was towards the end of the concluding argument that any substantial discussion of the Clause was made, and this fell within the confines of just interpreting the portion relating to "domestic violence."[84]

Concentration on these principles to the near exclusion of the Guarantee Clause more than likely benefitted the purposes of legal disputation. But the polemical forces of debate by

[81] Luther vs Borden, 7 Howard 589.

[82] Ibid., p. 590.

[83] Ibid.

[84] U. S. Constitution, art. IV, sec. 4.

omission, placement, and accentuation yield a subtle, yet new, connotation to the Guarantee Clause best described as libertarian. The people's sovereignty and their right to form a government are elevated above the plane of the Guarantee Clause, since it is "subject only"[85] to the Clause's provisions. The result of these subtle intricacies is the creation of a concept of the Clause, positive and activist in meaning. Limitation with its negative connotation of restriction upon the principles of sovereignty and choice changes to a more positive one of qualification, the minimum qualification of certification requirement being republican in form.

Responding to these pleadings were John Whipple and Daniel Webster, attorneys for the defendant or, more specifically, the Charter Government. Among the many rebuttals, Webster's description of the Guarantee Clause and its purpose is notable:

> There must be an authentic mode of ascertaining the public will somehow and somewhere. If not, it is a government of the strongest and most numerous...
> What do the Constitution and laws of the United States say upon this point? The Constitution recognizes the existence of States, and guarantees to each a republican form of government, and to protect them against domestic violence. The thing which is to be protected is the existing State government. This is clear by referring to the Act of Congress of 1795. In case of insurrection against a State, or the government thereof, the President is to interfere. The Constitution proceeds upon the idea that each State will take care to establish its government upon proper principles, and does

[85] Luther vs Borden, 7 Howard 590.

> not contemplate these extraneous and irregular alterations of existing governments.[86]

Furthermore, the right to peaceable revolution was repudiated. The basic premise Webster defined was that the Guarantee Clause was designed to protect governments in existence. To buttress his argument Webster referred to Congress' Enforcement Act of 1795. The Militia Act of 1792 had expired and as William Wiecek points out:

> Congress, unwilling to dispense with such a useful statute, re-enacted its substance with some important changes as the Enforcement Act of 1795 ...The Enforcement Act of 1795 was supplemented by an 1807 statute authorizing the President to use regular army forces as well as the federalized militia for law enforcement purposes. The acts of 1795 and 1807 remain in the United States Code today, virtually unaltered from their original form, as the basic authority for federal control of state military forces.[87]

These considerations were important for two reasons. First, Webster used the Congressional Act as supportive evidence to advance his main premise that the Guarantee Clause was insurance to keep existing governments intact or, more precisely, the Guarantee Clause and the obligation to protect were one. Status quo best describes an interpretation of this nature. Second, Chief Justice Taney took what Webster intended as a supportive feature and provided an entirely different rendering of the Guarantee Clause.

[86] Luther vs Borden, 7 Howard 590.

[87] William M. Wiecek, The Guarantee Clause of the U. S. Constitution (Ithaca: Cornell University Press, 1972), p. 81.

Addressing himself to the implications in the pleadings before him, Chief Justice Taney discussed the court's inability, as a judicial body, to determine the qualifications of voters:

> It is the province of a court to expound the law not make it. And certainly it is no part of the judicial functions of any court of the United States to prescribe the qualifications of voters in a State, giving the right to those to whom it is denied by the written and established constitution and laws of the state, or taking it away from those to whom it is given; nor has it the right to determine what political privileges the citizens of a State are entitled to, unless there is an established constitution or law to govern its decision.[88]

He recognized the difficulties involved if the court were to take upon itself the task of determining whether a majority of the voters had or had not approved such a constitution. It would have required the testimony of witnesses, verification of all voters' qualifications, and lastly a question of how long the people of Rhode Island would have to wait to find out what government they were living under.

Paramount to these very real problems were several serious questions. The first one Chief Justice Taney gave cognizance to when he noted that this decision would have to be made by a jury, since the case was a question of fact. It would then depend upon the jury's judgment to ascertain the people of Rhode Island's form of government. The dangers

[88] Luther vs Borden, 7 Howard 598.

arising from this aspect of the case were quickly perceived by Taney who stated:

> And as a verdict is not evidence in suit between different parties, if the courts of the United States have the jurisdiction contended for by the plaintiff, the question whether acts done under the charter government during the period of contest are valid or nor must always remain unsettled and open to dispute. The authority and security of the State governments do not rest upon such unstable foundations.[89]

The second serious question was not directly approached by the Chief Justice; rather it was implied in his ready affirmation that cases pertaining to the Guarantee Clause:

> ...rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a a State are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.[90]

Furthermore, Taney used Webster's supportive argument involving the 1795 Enforcement Act to substantiate his position of congressional and executive jurisdiction with respect to the Guarantee Clause. Proceeding to the domestic violence provision of the Clause and considering the 1795 Enforcement Act alongside it enabled the Chief Justice to reinforce his previous argument with finality. Taney remarked:

[89] Luther vs Bordon, 7 Howard 599.

[90] Ibid.

> So, too as relates to the clause in the above mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of the court to decide when a contingency had happened which required the federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the Act of February 28, 1795, provided, that, "in case of an insurrection in any State against the government thereof it shall be lawful for the President of the United States, on application of the legislature of such state or of the executive (when the Legislature cannot be convened), to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to supress such insurrection."
>
> By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature or of the executive, and consequently he must determine what body of men constitute the Legislature, and who is the governor, before he can act...[91]

To one constitutional historian, William Wiecek, Chief Justice Taney's interpretation of the Guarantee Clause added to the already "repressive reading that Hamilton had given it in the Federalist."[92] Hamilton had viewed the Clause as an instrumental device for the Union to assert its authority in "repelling those domestic dangers which may sometimes threaten

[91] Luther vs Borden, 7 Howard 599.

[92] William M. Wiecek, The Guarantee Clause of the U. S. Constitution (Ithaca: Cornell University Press, 1972), p. 110.

the existence of the State constitutions..."[93] It was a safeguard for the preservation of order by the Union. So concerned was Wiecek about this point and the historical irony to later be witnessed during Reconstruction that he very casually passed over the heart of Taney's apprehensions.

> Taney's construction of the guarantee clause was absolutistic, and therein lay its great vice. Hallett's and Webster's arguments left him no latitude to maneuver. Hallett insisted that the Court adopt the theory of republican government that was then sharply debated in political forums and that, if adopted, would have made the Court the arbiter among fundamental political theories. Webster took advantage of this tactical indiscretion to urge total judicial abstention. Neither course was compelling, but Webster's appeared to be the less of two evils, and Taney took it, apparently without considering its implications for the future.[94]

Judging the Chief Justice's interpretation as "absolutistic" and pronouncing that "therein lay its vice"[95] is questionable. Unless the grounds for Taney's fears are more fully recognized, neither his position nor its future importance can be appreciated.

If the court had permitted itself jurisdiction over a decision of the State or Congress and the Executive relating to the legitimacy of a form of government, Taney knew it would

[93]Hamilton, Madison, Jay, The Federalist Papers No. 21: Hamilton (New York and Toronto: The New American Library, 1961) p. 139.

[94]William M. Wiecek, The Guarantee Clause of the U. S. Constitution (Ithaca: Cornell Univeristy Press, 1972), p. 124.

[95]Ibid.

not simply be a question of arbitrating "among fundamental political theories,"[96] but rather it would be a question of opening the door for the court to supplant those principles Hallett argued so eloquently for--the sovereignty of the people and the right to adopt a form of government. The fundamental implication was explicitly described by Taney's dissenting colleague, Justice Woodbury:

> And if the people, in the distribution of powers under the Constitution, should ever think of making supreme arbiters in political controversies, when not selected by nor, frequently amenable to them, nor at liberty to follow such various considerations in their judgments as belong to mere political questions, they will dethrone themselves and lose one of their own invaluable birthrights; building up in this way--slowly, but surely--a new sovereign power in the republic, in most respects irresponsible and unchangeable for life, and one more dangerous, in theory at least, than the worst elective oligarcy in the worst times.[97]

It is true Chief Justice Taney was not aware of the implications this case would have upon the future of the South. Yet with his adherence to federalism, Taney's interpretation of the Guarantee Clause, unlike Webster's status quo construction preserved not just existing government but the sovereignty of the people and the other rights Hallett so convincingly asserted.

Likewise if Luther vs Borden or sections of it are to be viewed as Taney nationalism, it must be done with utmost

[96] William M. Wiecek, The Guarantee Clause of the U. S. Constitution (Ithaca: Cornell University Press, 1972), p. 124.

[97] Luther vs Borden, 7 Howard 603.

caution. The legislature could be viewed as a political arena with its checks and balances, theoretically, more difficult to control by one faction or another because of its representative and elective nature. With the limited alternatives available, Taney might have considered it much safer to turn to these two national branches of government, the legislature and the executive, giving heavy emphasis to the former than accept a branch, the judicial, which might prove more susceptible to one dominant control within the body. The potential threat of one national branch of the government was to be balanced by the two other national branches. Among this balance states' rights could best be protected. If this was one of Taney's underlying motives in his decision, then Luther vs Borden under the aegis of Reconstruction dealt an even more poignantly ironic blow to his fears than has been previously recognized. It was the legislature that brought Luther out of safekeeping and used it and the Guarantee Clause as a base for extending a great portion of its authority in reconstructing and readmitting the South's rebel states.

But irrespective of this, Taney's main concern was the preservation of the sovereignty of the people, their right to adopt a form of government, and the guarantee of a republican government. By his pronouncement the Chief Justice separated the threads of the web Hallett's libertarian argument had woven and ultimately kept these fundamental doctrines distinct

and alive. It was for this purpose that Roger Brook Taney adopted a steadfast position on the political question doctrine.

The relationship of Luther vs Borden to Baker vs Carr is best expressed in Justice Felix Frankfurter's dissenting opinion in Baker where he liberally rebuked the Majority saying:

> To find such a political conception legally enforceable in the broad and unspecific guarantee of equal protection is to rewrite the Constitution. See Luther v. Borden, supra. Certainly, "equal protection" is no more a secure foundation for judicial judgment of the permissibility of varying forms of representative government that is "Republican Form." Indeed since "equal protection of the laws" can only mean an equality of persons standing in the same relation to whatever governmental action is challenged, the determination whether treatment is equal presupposes a determination concerning the nature of the relationship. This with respect to apportionment, means an inquiry into the theoretic base of representation in an accountably republican state. For a court could not determine the equal-protection issue without first determining the Republican-Form issue, simply because what is reasonable for equal-protection purposes will depend upon what form of government, basically, is allowed. To divorce "equal protection" from "Republican Form" is to talk about half a question.[98]

So incisive was his perception of the court's position that it haunted the justiciability argument with special fervor. Justice Brennan answered in lively judicial debate:

> Rather it is argued that apportionment cases, whatever the actual wording of the complaint, can involve no federal constitutional right

[98] Baker vs Carr, 82 S.Ct. 755-756.

> except one resting on the guaranty of a republican form of government, and that complaints based on that clause have been held to present political questions which are nonjusticiable.
>
> We hold that the claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause:..Appellants' claim that they are being denied equal protection is justiciable, and if "discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that discrimination relates to political rights." Snowden v. Hughes, 321 U.S. 1, 11...[99]

Soon after this response Justice Brennan proceeded to give an elaborate discussion of the 'political questions doctrine.' He attempted to define the doctrine as well as demonstrate its applicability in the various important decisions containing it. Highlighting Brennan's reassessment of the doctrine was Luther vs Borden. Heavily emphasizing Chief Justice Taney's crescendo of supporting arguments and the final declaration, Justice Brennan omitted the context of Taney's apprehensions which were the heart behind his reasoning and which were steeped with the 'political question doctrine' so quickly crystallized by Justice Woodbury. This omission resulted in the Majority's failure to give a true rendering of the political question doctrine' and the Guarantee Clause in the most crucial and relevant of the cases discussed.

What Justice Brennan did was establish a political right and divorce it from any consideration of government.

[99] Baker vs Carr, 82 S.Ct. 755-756.

By implication the Majority accepted its parallel application of the equal protection clause in Brown vs the Board of Education and Baker vs Carr. The result of this reasoning was the development of a new majoritarianism whereby representation was conceived on the equality-population basis. With Brennan's foundation of logic, gerrymandering could not exist. Its consideration would only mean inequality, because it is a term which admits to some type of special interest. Also, acceptance of Baker vs Carr and Reynolds vs Sims was an implied acknowledgement of the modern interpretation of the balancing version of the separation of powers.

It is something of a paradox that a Chief Justice who handed down Luther vs Borden, a decision extremely instrumental in preserving the constitutional characteristics of our Union, and Dred Scott vs Sanford, a gross perpetuation of civil injustice and a decision contributing to the outbreak of the Civil War, should find his historical opposite nearly a century later in Chief Justice Earl Warren who presided over Brown vs the Board of Education, one of many decisions his court rendered alleviating serious civil injustices, and Baker vs Carr, an attempt to solve the malapportionment problem of the states by injecting into constitutional law a new philosophy of

majoritarianism. The latter was based upon questionable judicial logic and accompanied by a modern statement of a fundamental ideological principle of American constitutionalism, the balancing version of the separation of powers. Perhaps it is here that Justice Frankfurter's objection should be posed. Should the court have entered the "political thicket"? The answer may be found in the effect the judicial reasoning of Baker vs Carr has had upon constitutional law and political thought and it may be found in the Oregon experience, wherein a state could and did resolve this controversial problem before U. S. Supreme Court action was taken.

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